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No. 256

IN THE

Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

LAWRENCE S. HELMERS, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

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THE JOHNSON & HARDIN CO. LAW PRINTERS
CINCINNATI, OHIO

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No. 656

IN THE

Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

LAWRENCE S. HELMERS, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

THE ISSUE

Petitioner concedes that the statute of limitations of Ohio is applicable (Pet. Br. 4). He concedes, moreover, that if the cause of action arose in Kentucky, the action is barred by the Ohio Borrowing Act (Section 11234 of the Ohio General Code). The question before the Court, therefore, is confined to the narrow issue—Did the cause of action arise in Kentucky within the meaning of the Ohio Borrowing Act?

The Circuit Court of Appeals for the Sixth Circuit held the cause of action arose in Kentucky and was barred by limitations (R. 2, et seq.). The Court held it arose there

because the assessment was payable in that State and because the facts that ripened the statutory liability into a cause of action occurred in that State. The Court's decision is in accordance with the long established construction of Section 11234 and of similar borrowing acts of other States. Its decision that the cause of action arose at the *place* the assessment was payable conforms, moreover, with the principles recently enunciated in *Rawlings* v. *Ray*, 312 U. S. 96 and *Fisher* v. *Whiton*, 317 U. S. 217, that the cause of action arises at the *time* the assessment is payable.

FACTS OMITTED FROM PETITIONER'S BRIEF

Several vitally important facts alleged in the complaint or stipulated by the parties are omitted from the statement of the case in Petitioner's brief and are ignored in the argument.

1. On March 20, 1931 the Receiver sent to each of the defendants an "assessment notice," reading in part as follows (R. 15-16):[1]

> "OFFICE OF THE RECEIVER
> THE NATIONAL BANK OF KENTUCKY
> LOUISVILLE, KENTUCKY
>
> Louisville, Ky., March 20, 1931
>
> As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver*, on or before April 1, 1931."[2]

[1] Pages of that part of Record showing proceedings in District Court and the part showing proceedings in Court of Appeals are both numbered from Page 1.

[2] Emphasis throughout this brief is ours.

In sending this notice, the complaint alleges, the Receiver was "acting pursuant to the authority and direction of the Comptroller of the Currency" (R. 15). In view of this allegation, which must be taken as true on motion to dismiss, the Receiver cannot properly argue that he was "not authorized by the Comptroller . . . to designate or to fix a place for payment" (Pet. Br. 11).

2. Attached to the notice was a copy of the order of assessment made by the Comptroller (R. 16). This order of assessment is Exhibit 1 (R. 27). A vital paragraph of this assessment is:

> "NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and *requisition* upon the shareholders of the said 'The National Bank of Kentucky of Louisville,' for Four Million ($4,000,000) dollars, to be paid by them on or before the first day of April 1931, and I hereby make *demand* upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Paul C. Keyes, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders" (R. 28).

The Receiver now argues his notice was not a "demand" for payment (Pet. Br. 12), though the attached assessment makes *demand*. Furthermore, "requisition" means "an authoritative demand" *Webster's New International Dictionary* (1931). In *McDonald* v. *Thompson*, 184 U. S. 71, 76, an exactly similar procedure in similar language was held to be a demand for payment.

3. It is stipulated that the organization certificate of The National Bank of Kentucky provides its operations are to be carried on in Louisville, Kentucky (R. 26). By express provision of the National Bank Act, it was pro-

hibited from transacting business in any other place. 12 U. S. C. Sec. 81. It is further stipulated that "the business of the National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky, *and in no other place*" (R. 26).

SUMMARY OF RESPONDENTS' ARGUMENT

The Sixth Circuit decision that the action was barred by limitations is correct for the foliowing reasons:

1. The National Bank Act provides no period of limitations for actions to enforce the double liability of shareholders. Hence, the applicable period of limitations is to be determined by the law of Ohio, the state in which the action was brought.

Rawlings v. *Ray*, 312 U. S. 96;
Pufahl v. *Estate of Parks*, 299 U. S. 217;
McClaine v. *Rankin*, 197 U. S. 154;
McDonald v. *Thompson*, 184 U. S. 71.

Although the suit was brought in equity, the statutes of limitations of both Ohio and Kentucky apply to actions in equity as well as at law. *Bryant* v. *Swetland*, 48 O. S. 194 (1891); *Harris* v. *Sewell's Adm.*, 87 Ky. 63 (1888). Moreover, the cause of action is a legal one [*Hale* v. *Allison*, 188 U. S. 56; *Church* v. *Hubbard* (6th Cir. 1937), 91 F. (2d) 406], for which equity affords a concurrent remedy in aid of the legal right to avoid a multiplicity of suits. *Bailey* v. *Tillinghast* (6th Cir. 1900), 99 Fed. 801; *Anderson* v. *Abbott* (D. C. Ky. 1938), 23 F. Supp. 265, 268. In such a case the Federal courts sitting in equity are bound by the state statute of limitations under the familiar principle recently reiterated in *Russell* v. *Todd*, 309 U. S. 280 at 289 that

> "when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid

of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations."

Thus, in *McDonald* v. *Thompson, supra,* a receiver's action in equity to enforce a double liability assessment against the transferor of stock was held barred by limitations.

2. Section 11234 of the General Code of Ohio "borrows" the period of limitations for like causes of action of the state "where the cause of action arose," if that period is shorter than the Ohio period.

Payne v. *Kirchwehm*, 141 O. S. 384 (1943), app. dis. 320 U. S. 706;

B. & O. R. R. Co. v. *Reed* (6th Cir., 1915), 223 Fed. 689, certiorari denied, 239 U. S. 640;

Auglaize Box Board Co. v. *Kansas City Fibre Box Co.* (6th Cir., 1929), 35 F. (2d) 822, certiorari denied, 281 U. S. 730;

Hilliard v. *Pa. R. R. Co.* (6th Cir., 1934), 73 F. (2d) 473, certiorari denied, 294 U. S. 721.

3. The cause of action arose in Kentucky because;

(a) the assessment was payable in Kentucky and that state was, therefore, the place of performance of the obligation sued on, and

(b) all the operative facts that gave rise to the cause of action, including insolvency of the national bank, occurred in Kentucky, where the bank was located and domiciled and where it transacted all its business.[2]

---

[2] The only circumstance that did not occur in Kentucky was the Comptroller's action in making the order of assessment. This occurred at the Comptroller's office in the District of Columbia (R. 27). If the cause of action were deemed to have arisen in the District of Columbia, the action is nevertheless barred, because the applicable period of limitations in the District of Columbia is three years. District of Columbia Code (1929), Title 24, Sec. 341; *Strasburger* v. *Schram* (Ct. App. D. C. 1937), 93 F. (2d) 246. The District of Columbia is a state within the meaning of statutes such as Section 11234. *Talbott* v. *Silver Bow County*, 139 U. S. 438, 444-445; *McLaughlin* v. *Poucher*, 127 Conn. 441 (1941). This alternative contention was suggested by us in the Court of Appeals but was not passed upon by that Court.

4. The period of limitations provided by Kentucky law for an action such as this is five years. Sec. 413.120 Ky. Rev. Stat. (1944); *Aldrich* v. *Yates* (C. C. Ky. 1899), 95 Fed. 78. This is shorter than the period provided by Sec. 11222 of the General Code of Ohio for actions upon a liability created by statute, which is six years. Hence this action is subject to a five year period of limitations by reason of Section 11234 of the General Code of Ohio.[4]

5. The action was commenced December 12, 1936, more than five years after it accrued. The assessment was levied February 20, 1931 (R. 4, 5). It was payable at the office of the Receiver in Louisville, Kentucky, on April 1, 1931 (R. 4, 5, 16). The action was, therefore, barred at the very latest on April 2, 1936. *Rawlings* v. *Ray*, 312 U. S. 96. Since the action was not brought until nine months thereafter, it is barred by virtue of Section 11234.

MISCONCEPTIONS INVOLVED IN PETITIONER'S ARGUMENT

Petitioner's argument is based on four misconceptions of law:

1. *Petitioner's Confusion of "Liability" with "Cause of Action"*— Throughout his brief petitioner confuses "liability" with "cause of action." Thus he contends:

> "Since the laws of the country creating petitioner's *cause of action* provided no period of limitations to be borrowed, it is subject only to the general limitation of the forum" (Pet. Br. 8-9).

But the federal statute created only the *liability*. It did not create the *cause of action*, any more than the execution of a note creates a cause of action before default in payment or the issuance of an insurance policy creates

[4] Since the defendants were all residents of Ohio, the Kentucky statute of limitations would not have been tolled during their absence from Kentucky. *Daly* v. *Power*, 248 Ky. 533 (1933).

a cause of action before occurrence of a loss. Petitioner's cause of action, like every cause of action, arose as a result of *facts*,—all of which occurred in Kentucky.

The distinction between "liability" and "cause of action" is clearly developed in the lower court's opinion (R. 8).

The distinction is important in this case because of the provisions of the Ohio Borrowing Act. It does not borrow, as Petitioner seems to assume, the limitations of the jurisdiction whose laws created the liability. As far as that statute is concerned, it is immaterial under what law the liability was created or whether it was created by law or by contract. The statute borrows only the applicable period of limitations of the state "where the cause of action arose."

2. *Petitioner's Contention That the Assessment Fully Matured the Cause of Action*—Petitioner's entire argument that the cause of action did not arise in Kentucky is based on a *dictum* in *Pufahl* v. *Parks*, 299 U. S. 217, 223, that the Comptroller's assessment fully matured the cause of action (Pet. Br. 5, 6). This dictum was expressly limited by the later decisions of *Rawlings* v. *Ray*, 312 U. S. 96 and *Fisher* v. *Whiton*, 317 U. S. 217. In both cases this Court held that where the Comptroller fixes a time for payment, there is not "a complete and present cause of action" until the time so fixed for payment. Hence not merely the assessment but failure to pay the assessment is necessary to ripen the liability into a cause of action.

3. *Petitioner's Contention That Non-Payment Is Not Part of the Cause of Action*—Petitioner argues it is immaterial that the assessment was payable in Kentucky, asserting that non-payment is not part of the cause of action (Pet. Br. 13-14). But, in an action on an obligation for the payment of money, non-payment is universally held to be an essential part of the cause of action that must be

alleged in the complaint. 48 *C. J.* 665, Sec. 129. This is true even in those jurisdictions where, as a rule of pleading, payment must be pleaded as an affirmative defense. See, for example, *Lent* v. *N. Y. & M. R. Co.*, 130 N. Y. 504, 510 (1892):

> "It does not admit of controversy that upon an ordinary contract for the payment of money, *non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action*, and being such within the rule of the Code it should be alleged in the complaint."

After pointing out that the rule that payment is also an affirmative defense had its origin in the peculiarities of common law pleading but has been followed under the Codes so that the plaintiff might be apprised of the precise nature of the defense, the court says:

> "But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect and lead to embarrassments that are avoided when the plain provisions of the Code are followed." (Id. at p. 511)

The complaint alleges that the pro rata amount of the assessment is "*due* from each stockholder" (R. 19). This is equivalent to an allegation of non-payment, as otherwise the assessment would not be "due." 8 *Am. Jur.* 565, Sec. 957.

4. *Petitioner's contention that the United States is a "country" within the meaning of the Ohio Borrowing Act.* Petitioner urges that the word "country" in Section 11234 includes the United States. From this he argues that the cause of action arose in the "country of the United States" and not in Kentucky (Pet. Br. 7).

It is inconceivable that a cause of action can arise in the United States and not in one of the states of the United States. The United States is a "union of states." *Texas v. White*, 74 U. S. (7 Wall.) 700 at 721. Kentucky is one of the states of the Union. Consequently, even if we assume that the United States is a country within Section 11234 and that the cause of action arose there, it does not follow that the cause of action did not also arise in Kentucky. The Ohio statute borrows the limitations of "*any* state or country where the cause of action arose."

With respect to Petitioner's argument, the Court of Appeals stated (R. 12):

> "*If the critical act occurred within the geographical limits of the United States it necessarily occurred within the geographical limits of one of the 48 states or the District of Columbia.* In this case the liability is created by a law of the United States, rather than by the law of Kentucky or of any other state, but the cause of action arose through a combination of that law and the failure to perform the duty imposed by that law. The failure to perform the required duty occurred in Kentucky, not in the United States generally without occurring in any of the subdivisions thereof."

In international law, the United States is regarded as a political entity with geographical location and boundaries, but in domestic law the United States is "the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 at 672. *Langdell, "The Status of our New Territories,"* 12 Harv. L. Rev. 365, 371.

Irrespective of its political status, it is apparent that the United States is not a "country" within the meaning of Section 11234, and that that word was intended to refer

to a foreign country. There has never been a general federal statute of limitations for civil actions, and as to any liability arising under a federal statute providing its own period of limitations, such period would control regardless of state law. *Herget* v. *Central Nat. Bank & Trust Co.*, 324 U. S. 4. Consequently, there never has been a federal period of limitations that the Ohio statute could have borrowed. It should not be assumed that in using the word "country" in Section 11234 the Ohio Legislature was doing a vain thing. In *H. O. L. C.* v. *Caplan*, 236 Mo. App. 1276 (1942), a Missouri statute requiring the qualification of corporations organized under the laws of "any other state, territory or country," was held not to apply to a corporation organized under the laws of the United States but only to one incorporated under the laws of another state or a "foreign country."

A CAUSE OF ACTION ARISES AT THE PLACE WHERE THE OPERATIVE FACTS OCCUR. IN THE CASE OF AN OBLIGATION TO PAY MONEY, IT ARISES AT THE PLACE FIXED FOR PAYMENT.

The Ohio Borrowing Act and similar statutes of other states have been in effect for almost a century, and the phrase "where the cause of action arose" has acquired a well recognized meaning. In general, a cause of action is held to arise at the place where the operative facts constituting the cause of action occur. Where the obligation is solely for the payment of money, the cause of action is held to arise at the place fixed for payment—nonpayment being the operative fact that finally matures the cause of action.

In *West* v. *Theis*, 15 Idaho 167 (1908), the Court, after reviewing authorities from numerous states, concluded:

> "Section 4079, referring to 'a cause of action that has arisen in another state' has reference to the state

or jurisdiction in which the contract or obligation was to be performed or discharged. . . ."

The Court of Appeals for the Sixth Circuit followed this rule. It held (R. 7, 8):

> "A cause of action 'is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf.' *B. & O. R. R. Co.* v. *Larwill,* 83 O. S. 108, 115-116. See *Oman* v. *Delius,* 162 Tenn. 192, 199-200; *Maryland Casualty Co.* v. *Gerlaske,* 68 Fed. (2d) 497, 499 (C. C. A. 5th). The place where a cause of action arises is the place where the operative facts that give rise to the action occur. Although it may be necessary that a number of separate facts exist in order to create a cause of action, yet it is the happening of the last of such facts which brings the cause of action into existence. Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe,* 300 U. S. 598, 603."

It has sometimes been urged that a cause of action can only arise in the state where the defendant may be sued. But, as to transitory actions, this view has been rejected by the Supreme Court of Ohio, the Federal courts and the courts of many other jurisdictions, which hold that the defendant's residence has no bearing on the place where the cause of action arises. *Payne* v. *Kirchwehm,* 141 O. S. 384 (1943), app. dis. 320 U. S. 706; *Anglo-American Land M. & A. Co.* v. *Lombard,* (8th Cir. 1904) 132 Fed. 721;[8]

---

[8] In this case, Mr. Justice (then Circuit Judge) VanDevanter stated:

"The place where a cause of action arises is not determined by inquiring where it may be enforced. The two things are not the same. The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." (132 Fed. at 750).

Klotz v. *Angele*, 220 N. Y. 347 (1917); *McKee* v. *Dodd*, 152 Cal. 637 (1908); *West* v. *Theis*, *supra*.

In accordance with the foregoing rules, a cause of action for tort is usually held to arise in the place where the tortious acts were committed. *B. & O. R. R. Co.* v. *Reed* (6th Cir., 1915), 223 Fed. 689, certiorari denied, 239 U. S. 640; *Hilliard* v. *Pennsylvania R. Co.* (6th Cir., 1934), 73 Fed. (2d) 473, certiorari denied, 294 U. S. 721. A cause of action for breach of contract arises at the place where the breach occurred. *Auglaize Box Board Co.* v. *Kansas City Fibre Box Co.* (6th Cir., 1929), 35 F. (2d) 822, certiorari denied, 281 U. S. 730; *Pond Creek Mill & Elevator Co.* v. *Clark* (7th Cir., 1920), 270 Fed. 482; *Wester* v. *Casein Co. of America*, 206 N. Y. 506 (1912). If the obligation is solely for the payment of money, as in the case of a promissory note, the cause of action arises at the place where payment should have been made. *Payne* v. *Kirchwehm*, *supra*; *Alropa Corp.* v. *Kirchwehm*, 138 O. S. 30 (1941); *Bowers* v. *Holabird*, 51 O. App. 413 (1935).

The recent decision of the Supreme Court of Ohio in *Payne* v. *Kirchwehm*, *supra*, is an excellent example of this principle. A suit was brought in Ohio on several notes executed and payable in Florida. The defendant was a resident of Ohio who had never resided in Florida and who was not in that state at the time the cause of action accrued or at any time thereafter. (See 141 O. S. at 394.) The Ohio period of limitations was fifteen years and the Florida period, five years. The court held that the cause of action arose in Florida where the notes were payable, notwithstanding that because of his absence from that state, defendant could not have been served there. Consequently the court held the Florida five year limitation applicable by reason of Sec. 11234 of the Ohio General Code and that the action was barred.

In *McKee* v. *Dodd*, 152 Cal. 637 (1908), the court stated:

"A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, Sections 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty of the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states.' It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment,—New York state. *It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment,—New York state. His failure in this regard gave rise to the cause of action, and clearly, therefore, that cause of action arose in the state of New York.*"

See to the same effect:

West v. *Theis*, 15 Idaho 167 (1908);
Swift v. *Clay*, 127 Kan. 148 (1928);
Chevrier v. *Robert*, 6 Mont. 319 (1887);
Klotz v. *Angele*, 220 N. Y. 347 (1917);
Balee v. *Hidalgo County Water Improvement District*, 229 A. D. 660, 242 N. Y. S. 676 (1930);
Lawson v. *Tripp, et al.*, 34 Utah 28 (1908).

Petitioner suggests, without any supporting reason, that a different rule applies to causes of action upon a liability created by federal statute. But the cases hold otherwise. Thus, an action for treble damages under the Federal Anti-trust laws is held to arise in the state in which the illegal acts occurred. *Seaboard Terminals Corp.* v. *Standard Oil Co.* (2d Cir., 1939), 104 F. (2d) 659; *Bluefields S. S. Co.* v. *United Fruit Co.* (3d Cir., 1917), 243 Fed. 1; *Hansen Packing Co.* v. *Swift & Co.* (D. C. N. Y. 1939), 27 F. Supp. 364. A cause of action for overtime compensation and liquidated damages under the Fair Labor

Standards Act of 1938 is held to arise in the state where the work was performed. *Smith* v. *Continental Oil Co.* (D. C. N. Y., 1945), 59 F. Supp. 91.

In the District Court opinion in *Seaboard Terminals Corp.* v. *Standard Oil Co., supra,* Judge Patterson stated:

> "It is urged that a cause of action for treble damages under the national antitrust acts does not arise in any particular state. The fact is, however, that the cause of action does arise in the place or places where the impact of the defendants' conduct is felt by the plaintiffs, and if the law of the forum refers to the law of such place or places for the applicable limitations on actions, the law of that place or places becomes controlling" (24 F. Supp. 1018 at 1020-21).

THIS CAUSE OF ACTION AROSE IN KENTUCKY

(a) How the Cause of Action Arose.

That this cause of action arose in Louisville, Kentucky, is apparent from the manner in which a cause of action of this kind arises. *Liability* of national bank stockholders for the debts of the bank is provided by federal statute. 12 U. S. C. §§ 63, 64.* But the federal statute does not create the *cause of action.* The liability provided by statute is only "potential"; until the failure of the bank it is merely a "latent possibility." *Brown* v. *O'Keefe,* 300 U. S. 598, 603. It is only upon insolvency and liquidation that this potential liability becomes actual. In *Brown* v. *O'Keefe, supra,* the Court states:

> "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one presently enforcible, as soon as a

* Since July 1, 1937, National Bank stockholders are not subject to double liability provided the bank has published a notice of termination of liability as required by statute. 12 U. S. C. Sec. 64(a).

qualified claimant appears upon the scene'' (300 U. S. at 603).

Before the Comptroller may direct the Receiver to enforce shareholders' liability, he must first find that the Bank is insolvent and that it is necessary to enforce the liability in order to pay its debts. 12 U. S. C. §§ 191, 192. This direction is customarily given by an order of assessment. Even then the liability has not ripened into a cause of action. If, as in the instant case, the order of assessment fixes a date for payment, the cause of action does not arise until and unless the shareholder fails to pay the assessment by the date fixed. Until then, no suit can be brought on the assessment. *Rawlings* v. *Ray, supra.* Should a shareholder pay the assessment before the payment date, no cause of action would arise against him.

The operative facts that gave rise to this cause of action, therefore, were (a) the insolvency of the Bank and (b) the failure to pay the assessment at the time and place fixed for its payment. Both occurred in Kentucky.

(b) The Assessment Was Payable in Kentucky.

The place of performance of the obligation sued on in this case was Louisville, Kentucky. It was there that the assessment was payable by express direction of the Receiver, given ''pursuant to the authority and direction of the Comptroller'' (R. 15, 16). Even in the absence of such a direction, the assessment would have been payable at the Receiver's office in Louisville under the familiar rule that where no place of payment is specified, it is the duty of the debtor to seek out the creditor and the obligation is payable at the creditor's place of business. 48 *C. J.* 592, 593; *Dockham* v. *Smith*, 113 Mass. 320 (1873). As a practical matter there was no place other than the Receiver's office at Louisville where the assessment could have been paid.

The rule is now well established that the cause of action arises at the *time* the assessment is payable. *Rawlings* v. *Ray* (1941), 312 U. S. 96. It arises at that time because it is then that it first becomes a "full and complete" cause of action. For the same reason the cause of action must also arise at the *place* the assessment is payable, for "the time when the cause of action arises determines, also, the place where it arises." See *Wester, et al.* v. *Casein Co. of America*, 206 N. Y. 506 (1912), where the court quoted from Cleasby, J., in *Durham* v. *Spence*, L. R. Vol. 6 (1870-71), page 52, as follows:

> "The cause of action must have reference to some time as well as some place. Does, then, the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines, also, the place where it arises; for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises."

Insofar as concerns the place where the cause of action arose, the situation is the same as if each defendant had executed a note to The National Bank of Kentucky payable at Louisville on April 1, 1931. Had there been default on these notes, the resulting causes of action, whether enforced by the Bank or its Receiver, would have arisen at Louisville. See cases cited, *supra*, pp. 11-12. Although the liability here was created by statute rather than by contract, the distinction is immaterial in determining where the cause of action arose. In either case the obligation is solely for the payment of money at a fixed time and place. Moreover, the superadded liability of national bank stockholders, though created by statute, is contractual in both "its origin and basis." See *Brown* v. *O'Keefe*, 300 U. S. 598, 606-7.

Petitioner now attempts to repudiate both his assessment notice and the allegations of his complaint. His argument that because the order of assessment did not fix the place of payment he was not empowered to do so (Pet. Br. 11), lacks conviction in view of the positive allegation that the "assessment notice" was sent "pursuant to the authority and direction of the Comptroller" (R. 15). Irrespective of this, the Receiver had been clearly authorized by the Comptroller to fix the place for payment by the terms of the order of assessment, which directed him to "take all necessary proceedings, by suit or otherwise," to enforce the individual liabilities of the shareholders.

This Court has recently held that the Comptroller has the authority to fix the time for payment of an assessment (*Rawlings* v. *Ray, supra*) and to extend the time originally fixed (*Fisher* v. *Whiton, supra*). On the same principle, the Comptroller clearly has the power to fix the place of payment or to authorize the Receiver to do so. The Receiver is the agent of the Comptroller [*Oosterhuis* v. *Palmer* (2 Cir., 1943), 137 F. (2d) 322, 325] and his powers are to be liberally construed. *Wittnebel* v. *Loughman* (D. C. N. Y., 1935), 9 F. Supp. 465, aff'd 80 F. (2d) 222, certiorari denied, 297 U. S. 716.

The Petitioner further seeks to avoid the effect of his notice by characterizing it as a mere "warning" that he intended to look to the shareholders "for what he was unable to recover from the holding company" (Pet. Br. 12). But the obligation of the defendants was not secondary to that of the holding company. *Anderson* v. *Abbott*, 321 U. S. 349 at 357. Moreover, the Receiver claimed and recovered interest from shareholders from April 1, 1931, the date fixed for payment in the notice. *Abell* v. *Anderson* (6th Cir., 1945), 148 F. (2d) 372.

That the Receiver's notice was a "demand" for payment, see *supra*, p. 3.

(c) The Insolvency Occurred in Kentucky Where the Bank Was Domiciled and Transacted All Its Business.

Non-payment of the assessment at the time and place fixed for its payment was the last of the operative facts that gave rise to this cause of action. The operative facts that preceded it were the insolvency and liquidation of the bank, which "transformed the potential liability into one presently enforcible." These facts, too, occurred in Kentucky where the entire business of the Bank was conducted.

The assessment was on the stock of The National Bank of Kentucky. Its organization certificate designated Louisville, Kentucky, as the place where its operations were to be carried on (R. 26). By express provision of the National Bank Act, it was prohibited from transacting business in any other place. 12 U. S. C., Sec. 22. *First National Bank* v. *Missouri*, 263 U. S. 640 at 657. The business of the National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Kentucky, *and in no other place* (R. 26).

Although organized under federal law, a national bank is a highly localized institution. Not only is its business restricted to the city specified in the organization certificate, but its place of business may be changed only with the consent of the Comptroller, and then only in the same state. 12 U. S. C. Sec. 30. The requisite amount of capital with which a national bank may commence business is determined by the population of such city. 12 U. S. C. Sec. 51. Its list of shareholders, open to the inspection of all creditors, must be kept in the office where its business is transacted. 12 U. S. C. Sec. 62. Three-fourths of its direc-

tors must reside in the state where it is located and must continue to reside there. 12 U. S. C. Sec. 72. It may consolidate only with such other national or state banks as are located within the same state. 12 U. S. C. Secs. 33, 34(a). A national bank may, under certain circumstances, operate branches but such branches must be within the state where the national bank is located. 12 U. S. C. Sec. 36.

Consequently, it has been frequently held that a national bank is a resident of and is domiciled in the state where it is located.

In re Standard Oak Veneer Co. (D. C. Tenn., 1909), 173 Fed. 103;
Schmitt v. *Tobin* (D. C. Nev., 1935), 15 F. Supp. 35.

Significantly the very first allegation of the complaint is that the National Bank of Kentucky is:

"... *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R. 1).

By an express statutory provision a national bank is, for jurisdictional purposes, a "citizen" of the state in which it is located. 28 U. S. C. Sec. 41 (16). It may be sued only in the district in the state where it is located. 12 U. S. C. Sec. 94; *Leonardi* v. *Chase National Bank* (2d Cir., 1936), 81 Fed. (2d) 19, certiorari denied, 298 U. S. 677.

In *Hunter* v. *The Niagara Fire Insurance Company*, 73 O. S. 110 (1905), an Ohio resident brought suit in Ohio against a New York insurance company on a fire insurance policy covering plaintiff's property located in Florida, which had been destroyed by fire. The action was barred by the Florida statute of limitations, but not by the Ohio statute. Section 4990 of the Revised Statutes of Ohio

(superseded by Section 11234 of the General Code) provided,

> "If, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state."

The court held that the cause of action arose in Florida, where the fire occurred, and that, therefore, the action was barred.

There is a striking analogy between the *Hunter* case and the instant one. In the *Hunter* case the liability of the defendant was created by the contract of insurance; in this case the liability was created by a federal statute. In the *Hunter* case the liability ripened into a cause of action by reason of the fire in Florida and hence the cause of action was held to have arisen there. In this case the liability of the stockholders ripened into a cause of action by reason of the insolvency of the National Bank. Its insolvency occurred in Kentucky where the assessment was also payable. Hence, this cause of action arose in Kentucky.

Petitioner urges that ownership of stock is also one of the operative facts (Pet. Br. 10). But it is only ownership in stock of a national bank that has become insolvent that is material to the cause of action. Mere ownership of stock, unaccompanied by insolvency of the bank and failure to pay an assessment, obviously cannot give rise to a cause of action.

DISCUSSION OF THE THIRD CIRCUIT DECISION

Although the decision of the Court of Appeals for the Third Circuit in *Anderson* v. *Andrews*, 156 F. (2d) 972 (*sub nom. Cope* v. *Anderson*, No. 593, October Term, 1946) is distinguishable from the instant case, as set forth in our

brief in opposition to petition for certiorari (pp. 7-8), nevertheless, we respectfully submit that the *Andrews* case was incorrectly decided.

The Third Circuit decision is based on two grounds. The first is that Kentucky was not the place of payment because

> "The recipient of the payment was really not the Receiver but the Comptroller General of the United States, who, obviously, is not located in Kentucky."

It is clear, however, that the ultimate disposition of the proceeds of any recovery by the plaintiff in an action has no bearing on where the cause of action arises. Suppose, for example, the Receiver held a past due note of the defendants payable at Louisville, Kentucky. By force of statute the Receiver would be required to remit to the Comptroller any amounts collected by him on the note (12 U. S. C. Sec. 192); yet no one would contend that the cause of action did not arise in Kentucky. If the court's theory (which finds no support in any decided case) were correct, then every cause of action held by a receiver or fiduciary would not arise where the operative facts occur but at the place or places where the ultimate recipients of a possible recovery might reside, even though they were not parties to the action. Obviously this is not sound law.

Moreover, the Comptroller, though he determines the necessity for the assessment, is not empowered to bring a suit to enforce it. The Receiver is the only party who has authority to collect the assessment or to "enforce the personal liability of the shareholders" by suit. 12 U. S. C. §§ 191, 192.

The second and "wider" ground of the Third Circuit decision is not clear. After referring to *Holmberg, et al. v. Armbrecht, et al.*, 327 U. S. 392 as an "approach" to the problem, the opinion states:

"Ordinary state rules of law are not applicable to create or to limit the claim. We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the United States."

If by this the Court means that the local law of limitations is not applicable to the action, the decision is clearly incorrect. The rule is firmly established that actions against national bank stockholders for double liability are governed by state statutes of limitations. See cases cited, *supra*, page 4. In fact, an earlier portion of the opinion states that the "local law of limitations . . . . is applicable" [156 F. (2d) at 973].

If, on the other hand, the Court means that the cause of action did not arise in Kentucky because the liability was not created by Kentucky law, the decision is even less sustainable. It does not follow that a cause of action does not arise in a state where the operative facts occurred merely because it is for the enforcement of a liability created by the law of another jurisdiction. Numerous cases establish the principle that in determining the place where a cause of action arises the law by which the liability was created is of no materiality. See *supra*, pages 13-14.

The Court's allusion to *Holmberg* v. *Armbrecht*, *supra*, does not clarify the opinion. The *Holmberg* case, which arose under the Federal Farm Loan Act (12 U. S. C. 812), involved only the preliminary question presented here—whether any state statute of limitations was applicable.[7] As

[7] In the *Holmberg* case, the Court held that an action to enforce the liability of Federal Land Bank shareholders was not subject to local limitations because such an action involves "not only a federally created right but a federal right for which the *sole* remedy is in equity." Unlike the National Bank Act, the Farm Loan Act makes no provision for an assessment by the Comptroller on which an action at law may be brought against a shareholder; but the liability under the latter Act is enforcible only by a creditor's suit in equity in which the court must determine the existence and extent of

to this there is no dispute in the instant case (Pet. Br. 4). The *Holmberg* case did not involve, as here, a case where the equitable jurisdiction was concurrent with that of law; nor a state borrowing act nor a question as to where a cause of action arises. Since the state statute of limitations admittedly governs this action, as both the Third and Sixth Circuits held, the *Holmberg* case has no application to the instant one.

For an adverse criticism of the Third Circuit opinion and approval of that of the Sixth Circuit, see, 60 Harvard Law Review 303.

CONCLUSION

The assessment sought to be enforced in this case is on the stock of a national bank which was located and transacted all its business in Louisville, Kentucky. It was a distinctly local institution serving only the community in which it was authorized to do business. Its operations resulted in insolvency which necessitated this assessment. When the Receiver was appointed to liquidate the bank he properly established his office at Louisville, and when the assessment finally fell upon the stockholders, it was expressly made payable at the Receiver's office there. Everything that led up to this cause of action and every fact that constituted it occurred at Louisville, Kentucky. It was, therefore, at Louisville that the cause of action arose.

State Borrowing Acts such as Section 11234 are designed to prevent enforcement of claims that have become outlawed in the state where the cause of action arose. The

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insolvency and the amount of shareholder's liability. Because of this "divergence between the procedure for recovery of assessments from shareholders in national banks, and that for enforcing the liability of shareholders in a federal land bank" state statutes of limitations are applicable in the Federal courts to national bank assessment actions but not to suits arising under the Federal Farm Loan Act. See, *Russell* v. *Todd*, 309 U. S. 280, 285-287, 290-295.

statute serves precisely that purpose in the instant case. The Receiver filed suit against Kentucky shareholders in Kentucky, where the bank was located and many stockholders resided, in February, 1936, almost a year before the instant suit was commenced. It was only in December, 1936, after the claim had become stale in Kentucky, that the Receiver attempted to sue Ohio residents. Section 11234 was enacted for the purpose of protecting Ohio residents from just such harassment on outlawed claims.

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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